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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-697

ENCYCLOPAEDIA BRITANNICA, INC. AND BRITANNICA HOME LIBRARY SERVICES, INC.,

Petitioners

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Encyclopaedia Britannica, Inc. and its subsidiary Britannica Home Library Services, Inc. (hereinafter referred to jointly as "Britannica") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming an order issued by the Federal Trade Commission.

OPINIONS BELOW.

The majority and dissenting opinions in the Court of Appeals, not yet reported officially but reported unofficially at 1979-2 Trade Cas. (CCH) ¶ 62,793, are set forth in the Appendix (pp. A1-A25). The administrative proceedings before the Federal Trade Commission are reported at 87 F.T.C. 421 and are set forth in the Appendix (pp. A26-A184).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 2, 1979. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I.

In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), which held that non-deceptive commercial speech is entitled to First Amendment protection, this Court expressly referred to and left unresolved the question whether, and to what extent, the government may affirmatively require a commercial communication to appear in a certain "form" and to "include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Id.* at 771 n. 24.

The first question presented in this case is whether the Federal Trade Commission's "fencing-in" doctrine, under which the FTC asserts the authority to issue remedial orders which reach beyond practices actually found to be deceptive, violates the First Amendment when it is applied to require a publisher to include in its sales communications verbatim affirmative statements dictated by the FTC which are not necessary to prevent deception.

II.

The second question presented, on which the Court should grant the writ to resolve the sharp conflict between the decision of the Seventh Circuit below and the decision of the Third Circuit in *Beneficial Corp.* v. *FTC*, 542 F. 2d 611 (3d Cir. 1976), *cert. denied*, 430 U. S. 983 (1977), is whether the appropriate standard of judicial review of FTC remedial orders restricting commercial speech is the new more exacting one formulated in *Beneficial* for commercial speech cases or the old deferential one formulated in *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608 (1946), and applied by the Seventh Circuit below. This is

the precise issue on which the FTC sought certiorari in *Beneficial* before a conflict developed.

III.

The third question presented, on which review is required because the decision below is in direct conflict with established First Amendment principles enunciated by this Court, is whether a prior restraint on the truthful communications of a publisher engaged in the distribution of its publications, which prior restraint has not been demonstrated to be necessary to achieve a valid governmental objective, is constitutional under the First Amendment.

IV.

The fourth question presented is the unresolved statutory issue whether the FTC has the power under the Federal Trade Commission Act to issue an order which destroys the established manner of doing business of an enterprise when such drastic interference has not been demonstrated to be necessary to accomplish the FTC's remedial purpose.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provision involved is the First Amendment which provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

The statutory provision involved is the Federal Trade Commission Act, 15 U. S. C. § 45, which is set forth in the Appendix (pp. A184-A192).

STATEMENT OF THE CASE.

Britannica seeks review by this Court of a decision of the Court of Appeals for the Seventh Circuit affirming, by a 2-to-1 vote, an order (the "Order") of the Federal Trade Commission

("FTC") which directs Britannica to make affirmative statements in words and form dictated by the FTC in all its future communications to prospective purchasers of its publications.*

Britannica publishes the Encyclopaedia Britannica, widely recognized as the outstanding comprehensive reference work in the English language. Its principal method of marketing this reference work has for many years been to identify interested potential customers by seeking responses to promotional advertisements offering information, and then to visit them at their homes for sales presentations. Britannica's business depends upon these two brief opportunities to communicate its sales message to prospective customers. The FTC found that Britannica encouraged customers to listen to its sales presentations through use of misleading techniques in the advertisements and at home visits and it ordered Britannica to stop such misleading sales devices. Britannica does not contest this part of the Order. However, the Order goes on to require Britannica to make verbatim affirmative statements in its ads and at-home presentations which will actively *discourage* the customer from listening to Britannica's sales presentations.** It is these intrusive affirmative requirements, which go far beyond what is necessary to prevent deception, which Britannica claims violate the First Amendment and exceed the FTC's statutory authority.

Specifically, the challenged provisions of the Order require every Britannica sales representative to direct every prospective customer answering the door to read a *Miranda*-like warning card starkly proclaiming, in 10-point boldface type, the representative's identity, business affiliation, and sales purpose —and nothing else—in words and format selected by the FTC, before the representative may engage in any sales presentation. The card-at-the-door would appear as follows:

* The complete text of the Order appears in the Appendix (pp. A37-A51).

** Studies indicate that the Order would more than cut in half the number of consumers responding to Britannica's print advertising. See p. 8 *infra*.

ENCYCLOPAEDIA BRITANNICA, INC.

JOHN DOE

ENCYCLOPEDIA SALES REPRESENTATIVE

THE PURPOSE OF THIS REPRESENTATIVE'S CALL IS TO SOLICIT THE SALE OF ENCYCLOPEDIAS.

In addition, the Order directs Britannica to include in all advertising or promotional material containing an offer of books or information and seeking a reply from the customer the following exact words in the following precise format:

> **NOTICE TO CONSUMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING. . .***

Britannica offers for sale a product which many informed members of the public decide to purchase once they have listened to Britannica's sales messages. The words and conduct required by the Order, however, convey the impression that Britannica and its encyclopedia are, in the words of the dissenting judge below, "afflicted with a strange marketplace malady." (Dissenting opinion of Wood, J., at p. A23). Britannica does not wish to express its messages in the form dictated by the FTC. It does not wish, for example, to introduce its sales representatives as persons intending to "solicit"—a word defined in Webster's New Collegiate Dictionary, inter alia, as meaning "to entice or lure esp. into evil."

* A similar prescribed "warning," in bold-face type, is required to be included on any return card or coupon attached to the promotional material.

The utterances required by the Order are not necessary to prevent deception. Salesmen are not generally required to engage in a comparable procedure when contacting their customers, but no one would seriously suggest that their customers are thereby being deceived. Yet the Order—justified by the FTC under its "fencing-in" doctrine by which remedial orders may extend beyond practices found to be unlawful—bars all communications, irrespective of their truthfulness, which do not comply with the precise specifications as to wording and form dictated by the FTC.

Britannica submits that this unnecessary interference with its right to use words of its own choosing in speaking about its publications violates the First Amendment and exceeds the remedial authority of the FTC under the Federal Trade Commission Act.

The FTC Proceedings.

A complaint against Britannica was issued by the FTC on December 11, 1972. On December 16, 1974, an FTC administrative law judge ("ALJ") entered his findings, two portions of which formed the basis for the challenged provisions of the Order.

First, the ALJ found that in contacting prospective purchasers at their homes, Britannica sales representatives "misrepresented and failed to disclose" their sales purpose, frequently by representing that they wished to conduct an advertising survey (pp. A82-A86) or to deliver a prize or certificate of some nature. (pp. A86-A91)*

Second, the ALJ found that Britannica utilized magazine and direct mail advertising, inviting readers to send in response cards in order to receive free books or information concerning Britannica's products, without disclosing in the advertising that persons responding to such advertisements would be contacted

* Prizes or gifts were in fact delivered; however, the ALJ found that such visits were simply a method of gaining entrance for the purpose of selling.

by salesmen. (pp. A110-A112) He found that Britannica's use of the terms "send" and "direct from the publisher" affirmatively misrepresented that the free information would arrive by mail rather than by personal delivery by a salesman. (pp. A111-A112) The ALJ also found that contest entry cards similarly failed to disclose Britannica's sales purpose, and that the term "no obligation" and the statement that winners would be notified by telephone misrepresented the fact that winners would receive their prizes directly from a Britannica sales representative. (p. A112)*

Concluding that such practices violated Section 5 of the Federal Trade Commission Act, the ALJ included in the Order express prohibitions against future representations that Britannica sales representatives were: (1) engaged in any endeavor other than door-to-door sale of encyclopedias, (2) conducting a survey or other information-gathering activity, or (3) calling on a prospective customer for the primary purpose of delivering prizes or other items. (p. A41) Britannica does not challenge these prohibitions.

However, the ALJ then proceeded to go beyond the prohibition of communications found to be deceptive and affirmatively required Britannica and its salesmen to speak the words, quoted above, chosen by the FTC. The ALJ did this over Britannica's contention, with respect to the at-home visits, that the conduct found deceptive could be remedied in a far less intrusive manner by a simple cease and desist order forbidding Britannica salesmen from claiming that the purpose of their visits was anything other than to sell; or at most by an order requiring salesmen to orally disclose their identity, affiliation, and sales objective or requiring them to present an ordinary business card stat-

* There was never any claim that Britannica failed to deliver booklets or information to customers who requested them or that the contests were themselves in any way deceptive. The only claim, and the only finding, was that it was deceptive to offer booklets or prizes implying that they would come only through the mail, without disclosing in writing that those who responded would be placed on a list of prospective customers to be contacted by a salesman.

ing their identity, affiliation, and occupation as Britannica sales representatives.*

Similarly, with respect to its promotional ads, Britannica argued that the required disclosure—that responding persons might be contacted by a salesman—could be included in its advertising in any one of a variety of ways which would not so severely inhibit response as the rigid and intrusive "warning" language and format. For example, the statement "Responding persons may be contacted by a Britannica representative to see if they would like further information about Britannica's products" was suggested by Britannica as an alternative.**

In rejecting these suggested alternatives and in refusing to limit the Order to what was necessary to prevent deception, the ALJ relied on the FTC's "fencing-in" doctrine (p. A156) stating:

> "'. . . once the Government has successfully born the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.'" (p. A158)

Without discussion of the proposed alternative forms of disclosure, the ALJ stated that "No satisfactory alternatives are suggested." (p. A160)

On appeal to the FTC, Britannica renewed its objections to the portions of the Order which affirmatively required it to speak words chosen by the FTC. However, the FTC stated that the card-at-the-door "should suffice" to provide clear and conspicuous disclosure of Britannica's sales objective (pp. A30-A31) and that affirmative disclosure that a sales representative may call was necessary in the promotional advertisements. (p. A36) The FTC took it upon itself to draw the extraordinary conclusion that the language it required Britannica to speak was not "negative" (p. A36)* and, without even referring to the alternative forms of disclosure suggested by Britannica, it proceeded to uphold the Order with one minor exception.**

* Standard works on marketing underline the importance of the manner in which such initial contact is made. See, *e.g.*, Pederson & Wright, *Salesmanship Principles and Methods,* 320-21 (1971):

> "The first few seconds that a salesman spends with a prospect often makes or breaks a sale. . . . A negative first impression . . . sets up a barrier which may never be hurdled."

** Britannica urged the Seventh Circuit that the case be remanded to the FTC so that Britannica could present evidence of copy testing which has shown that inclusion of the "warning" in the form prescribed by the Order results in a drastic decline (substantially in excess of 50%) in the number of persons responding to Britannica's advertising.

The Court of Appeals Decision.

Britannica petitioned for review in the Seventh Circuit which upheld the Order, in a 2-to-1 decision, on August 2, 1979. Despite the First Amendment issues raised by the Order, the Court began its analysis by endorsing the *Siegel* *** standard of review, which accords "wide latitude" to the FTC in framing remedial orders. It stated "once a violation of the Act has been found, our role in reviewing the remedy is a narrow one" (p. A9), and that it was sufficient that "the requirement of the disclosures on initial contact and in the so-called promotional materials were reasonably related to the deceptive practices found." (p. A10) Despite the fact that the Order dictated the wording of a sales communication to an extent never before approved by any court, the majority expressed "no hesitancy in concluding" that the reasonable relation standard had been satisfied and affirmed the Order on the ground that the FTC had not "abused its discretion." (pp. A10-A11) In so holding, the majority expressly relied upon the FTC's "fencing-in" rule, which asserts the FTC's authority to fashion a remedial order whose provisions

* No decision of this Court has ever intimated that the First Amendment permits the government to determine whether certain speech is "positive" or "negative."

** The requirement that the 3-by-5 card state that "This card should be kept as part of your permanent records of this transaction" was deleted because, in the FTC's opinion, it "did not appear to be necessary in order to provide a clear and conspicuous disclosure of the nature and purpose of the call." (p. A30)

*** *Jacob Siegel Co.* v. *FTC,* 327 U. S. 608 (1946).

extend beyond the particular practices held to be unlawful. The majority stated: " 'Having been caught violating the Act, respondents "must expect some fencing it." ' . . ." (p. A10)

The majority rejected Britannica's contention that the affirmative disclosure requirements violate its First Amendment right to engage in truthful communications of its own choice concerning its publications. It concluded that, as the Order neither required Britannica to argue the opposing side of a controversy contrary to its beliefs nor required the deletion of a copyrighted advertising phrase (such orders had been partially or wholly overturned on appeal in *National Commission on Egg Nutrition* v. *FTC,** and *Beneficial Corp.* v. *FTC,*** respectively), the Order was not impermissibly broad. (p. A15) With respect to Britannica's proposed alternative methods for curing the deception found by the FTC, the majority conceded, "It is true that the ALJ and the Commission made no express comparison" involving the proposed alternatives. (p. A11) However, it excused this failure stating, in utter disregard of First Amendment principles, that the issue was "only the form of the disclosure to be required." (p. A12) The majority found an "implication" that a comparison had been made by the FTC (although the FTC did not even refer to the alternatives) and made no such comparison itself. (p. A12)

Judge Wood dissented from the affirmance of the Order, stating that the alternative methods of disclosure suggested by Britannica had been ignored by the FTC in favor of a harsh remedy "without any apparent consideration of the adverse effects upon Britannica likely to result from its prescription" (p. A22):

> "In my view this is a case where an agency, though with good intentions, in its big brother role has unnecessarily

* 570 F. 2d 157 (7th Cir. 1977), *cert. denied,* 439 U. S. 821 (1978).

** 542 F. 2d 611 (3d Cir. 1976), *cert. denied,* 430 U. S. 983 (1977).

> intruded too far into the conduct of legitimate business." (p. A23.)

Focusing upon the severely intrusive nature of the Order, Judge Wood stated that:

> "The remedies appear to me to go beyond any reasonable cure . . . Britannica makes plain the severe, adverse business impact which can be anticipated by its use of the prescribed stark warnings and procedures. It seems to me that to require a salesperson to use the warning card will suggest to many prospects that the sales representative and his company are afflicted with some strange marketplace malady. Even prospects who are predisposed to acquire for themselves and families the wealth of information found in an encyclopedia may be expected to turn to some competitor who does not exhibit such abnormal and strange commercial behavior." (p. A23.)

Judge Wood concluded that enforcement of the Order should be denied and the case remanded to the FTC "for reconsideration of a more appropriate remedy to be supported by a rational analysis." (p. A24)

REASONS FOR GRANTING THE WRIT.

The judgment below places a prior restraint of extraordinary severity upon speech protected by the First Amendment. In permitting the FTC to prescribe in rigid detail the exact words that Britannica must use in communicating with prospective customers—words not necessary to prevent deception—the Seventh Circuit has answered incorrectly the precise question left open by this Court in *Virginia State Board of Pharmacy, supra,* and sanctioned a widespread and overbroad FTC effort, under its so-called "fencing-in" doctrine, to dictate the form and content of commercial communications. This effort has already resulted in at least 44 reported orders, seven of which have already been reviewed by courts of appeals. The total failure of the FTC to curb its application of the "fencing-in" doctrine and to tailor its program of affirmative orders dictating the

form and words of commerical messages to new commercial free speech requirements has resulted in at least a partial reversal —as overbroad—of five of the seven orders thus far subjected to judicial review.

In applying, at the FTC's urging, the old "wide latitude" standard of review of remedial orders formulated in *Jacob Siegel Co.* v. *FTC,* 327 U. S. 608, 611-13 (1946), the Seventh Circuit's decision squarely conflicts with the decision of the Court of Appeals for the Third Circuit in *Beneficial Corp.* v. *FTC, supra,* which announced a new more exacting standard of review of FTC orders applicable in commercial speech cases. By adhering to the old deferential standard of review of FTC remedial orders, the Seventh Circuit has failed to adjust the standard of judicial review to new commercial free speech requirements, and by attributing to the FTC a First Amendment expertise which it does not possess has let stand an order which is simply unconstitutional.

Further, the Seventh Circuit has approved such an FTC restraint here applicable not to an ordinary commercial message but to the communications of a publisher of important educational, literary and scientific works engaged in the distribution of its publications—an activity subject to the most rigorous standards of First Amendment protection under this Court's decisions.

Finally, and apart from the issues arising under the First Amendment, the judgment of the Seventh Circuit accepts as a lawful exercise of the FTC's remedial powers under Section 5 of the Federal Trade Commission Act an order which largely destroys an established and valuable mode of doing business developed over many years without any demonstrated necessity for such drastic intrusion in order to prevent deception or achieve any other valid remedial objective.

I. The Writ Should Be Granted to Decide the Important First Amendment Question Left Open in Virginia State Board of Pharmacy Which Should Now Be Settled Because of the FTC's Widespread Program of Seeking Under Its "Fencing-In" Doctrine to Dictate the Form and Content of Commercial Communications.

A. The Writ Should Be Granted to Resolve the Question Left Open in Virginia State Board of Pharmacy.

The decision of the Seventh Circuit in this case presents the First Amendment issue which this Court expressly referred to and left unresolved in *Virginia State Board of Pharmacy, supra,* regarding the permissible scope of governmental authority to dictate the exact wording and form of a commercial message. In *Virginia State Board of Pharmacy* this Court stated that certain attributes of commercial speech "may make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive." *Id.* at 722 n. 24.*

The issue is presented in this case because the FTC has applied, and the Seventh Circuit majority has upheld, a "fencing-in" order far broader than the conduct found to have been unlawful and far broader than is necessary to prevent deception. This has become a routine practice by the FTC despite the fact that a "fencing-in" order which commands the actual words to be used and the type size in which they must appear is the most severe form of prior restraint possible. In addition to putting words in the mouths of Britannica's salesmen which they do not

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* Subsequently, in *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977), this Court again referred to and left open this question, stating: "We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." *Id.* at 384.

choose to speak,* the affirmative disclosure requirement restrains the salesmen from introducing their sales presentation with any other words delivered in any other manner.

The judgment below requires Britannica to have its salesmen direct each and every prospective customer to read a 3-by-5 inch card on which is printed in 10-point type, in *Miranda*-warning fashion, the statement: "THE PURPOSE OF THIS REPRESENTATIVE'S CALL IS TO SOLICIT THE SALE OF ENCYCLOPEDIAS," and requires Britannica to include in its promotional advertisements the statement: "NOTICE TO CONSUMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING. . . ." Britannica has a product of undeniable quality, an encyclopedia, which members of an informed public often wish to buy, read and enjoy once they have received a fair presentation of Britannica's messages relating to it. The Order, however, requires Britannica to introduce its messages with words and conduct dictated by the FTC, giving the impression that Britannica and its encyclopedia are, in the words of the dissenting judge below, "afflicted with a strange marketplace malady." (p. A23) Britannica does not wish to express its sales messages in the form dictated by the Order. Britannica's salesmen do not wish, for example, to describe their conduct to a prospective customer as involving an effort to "solicit"—a word defined in the dictionary, *inter alia,* as meaning "to entice or lure esp. into evil." Nor does Britannica wish to introduce the message that a salesman may contact a customer with the bold-face warning phrase "NOTICE TO CONSUMER," as though the salesman will be carrying a communicable disease rather than useful information regarding a valuable and desirable product.

* The First Amendment does not generally leave "it open to public authorities to compel [a person] to utter what is not in his mind." *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 634 (1943). The First Amendment protects both "the right to speak freely and the right to refrain from speaking." *Wooley* v. *Maynard,* 430 U. S. 705, 714 (1977).

Utterances in the form dictated by the FTC are not necessary to avoid deception. Potential customers would not be deceived if visiting salesmen identified themselves as Britannica representatives in a less startling manner or if Britannica's promotional advertising disclosed in more normal language that a responding consumer might be called upon by a salesman. The prior restraint embodied in the Order was sustained, however, on the basis of the FTC's "fencing-in" doctrine under which, having found a violation, the FTC claims authority to draft an order broader than the conduct found to have been unlawful.

However valid the FTC's "fencing-in" doctrine may be in general, Britannica asserts that, following this Court's decision in *Virginia State Board of Pharmacy, supra,* the doctrine is unconstitutional where it bans broad ranges of truthful commercial messages.* Britannica asks this Court to grant its petition and to announce a rule that the government may not dictate the content of a commercial message unless it can demonstrate that such an order is necessary to prevent deception and that alternate forms of curative messages proposed by the speaker are inadequate.

* The "fencing-in" doctrine was initially applied in antitrust cases having no First Amendment implications. See *FTC* v. *National Lead Co.,* 352 U. S. 419 (1957). In recent years, however, the FTC has applied it in false and misleading advertising cases. In the words of one commentator:

> "For more than sixty years the F.T.C. has gone its way oblivious to the First Amendment. Conceived as an antitrust agency, it has drawn on antitrust principles and remedies in regulating advertising. In fashioning relief, for example, the commission has issued broad 'fencing in' orders to advertisers and price fixers alike. . . . But advertisers are now in a different situation: there is no constitutional right to fix prices, but there is a constitutional right to advertise truthfully." Elman, "The New Constitutional Right to Advertise," 64 *ABA Journal* 206, 209 (February, 1978).

B. The Writ Should Be Granted Because of the FTC's Customary Imposition of Overbroad Prior Restraints in the Form of Affirmative Disclosure Orders Under Its "Fencing-in" Doctrine.

Resolution of this issue is now critical because there is an inherent conflict between the FTC's "fencing-in" doctrine as applied to advertisers, on the one hand, and their First Amendment rights enunciated in *Virginia State Board of Pharmacy*, on the other. A former FTC commissioner predicted, "The most serious impact on the FTC of these recent First Amendment decisions will be in curbing issuance of unjustifiably broad 'fencing in' rules and orders against against advertisers. . . ." Elman, "The New Constitutional Right to Advertise," 64 *ABA Journal* 206, 208 (February, 1978). Yet the FTC has not responded to this Court's decisions by tailoring its application of the "fencing-in" doctrine to meet First Amendment requirements, but has instead continued routine application of the doctrine in advertising cases.

The FTC considers the "fencing-in" doctrine to be generally applicable to its remedial authority. It has expressly relied upon it in no fewer than 36 cases, 17 of which were decided subsequent to this Court's decision in *Virginia State Board of Pharmacy*. To date, the FTC's application of its "fencing-in" doctrine in false and misleading advertising cases decided subsequent to *Virginia State Board of Pharmacy* has spawned seven decisions in the Courts of Appeals, five of which have resulted in partial or complete reversals of overbroad orders. See *Beneficial Corp.* v. *FTC*, 542 F. 2d 611 (3d Cir. 1976), *cert. denied*, 430 U. S. 983 (1977); *Warner-Lambert Co.* v. *FTC*, 562 F. 2d 749 (D. C. Cir. 1977), *cert. denied*, 435 U. S. 950 (1978); *National Commission on Egg Nutrition* v. *FTC*, 570 F. 2d 157 (7th Cir. 1977), *cert. denied*, 439 U. S. 821 (1978); *Porter & Dietsch, Inc.* v. *FTC*, 1979-2 Trade Cas. (CCH) ¶ 62,796 (7th Cir. 1979); *Standard Oil of California* v. *FTC*, 577 F. 2d 653 (9th Cir. 1978); *Jay Norris, Inc.* v. *FTC*, 598 F. 2d 1244 (2d Cir. 1979). See also *U. S.* v. *National Society of Professional En-*

gineers, 555 F. 2d 978 (D. C. Cir. 1977), *affirmed on other grounds*, 435 U. S. 679 (1978). Moreover, the FTC's broad construction of its remedial authority has resulted in the issuance of at least 37 orders (in addition to those reviewed in the court of appeals decisions mentioned above) both before and after *Virginia State Board of Pharmacy*, in which the FTC has not only ordered that deceptive advertising practices be discontinued but also affirmatively required certain words to be uttered, often specific words chosen by the FTC and often words not necessary to prevent deception.* Indeed, an FTC staff publication entitled *Consumer Information Remedies* states (at p. 276) "Affirmative disclosure requirements form the backbone of current FTC initiatives . . ." against misleading advertising.

* *See, e.g., In re Grolier, Inc.*, 91 F. T. C. 315 (1978) (encyclopedia publisher subject to affirmative disclosure provisions identical to those imposed in this case); *In re Crowell-Collier Pub. Co.*, 75 F. T. C. 241 (1969), *aff'd, P. F. Collier & Son Corp.* v. *FTC*, 427 F. 2d 261 (6th Cir. 1970) (door-to-door sales representatives of encyclopedia publisher required to disclose sales purpose orally); *In re Mather Hearing Aid Distrib., Inc.*, 78 F. T. C. 709 (1971) (hearing aid seller required to disclose that persons responding to its advertisements may be contacted by a salesman); *In re National Housewares*, 90 F. T. C. 512, 602 (1977) (seller of household appliances, tools and books required to say, when offering a gift by mail or phone, "We would like the opportunity to sell our products to you"); *In re Horizon Corp.*, No. 9017 (F. T. C., filed Sept. 21, 1979) (Initial Decision) (land sale company required to state, in specified language, that the land is not being sold as a financial investment, that its value is uncertain, and that any attempt by the buyer to resell the land would meet competition from the original seller); *In re Amrep Corp.*, No. 9018 (F. T. C., filed July 18, 1979) (Initial Decision) (land selling enterprise required to disclose, in specified language, that value of land is uncertain, that the land was not a financial investment, and "do not count on . . . being able to resell it"); *In re Raymond Lee Org., Inc.*, 92 F. T. C. 489 (1978) (promoter of inventions required to disclose, in specified language, the actual cost of its service and the number of clients whose earnings exceeded their costs); *In re American Home Products Corp.*, No. 8918 (F. T. C., filed Sept. 1, 1978) (Initial Decision) (maker of Anacin required to state in all ads, "Anacin is not a tension reliever"); *In re Bristol-Myers Co.*, No. 8917 (F. T. C., filed Sept. 28, 1979) (Initial Decision) (manufacturer of Bufferin and Excedrin required to disclose that its products contain aspirin

(Footnote continued on next page.)

A clear rule requiring the FTC to limit application of its "fencing-in" doctrine to avoid unnecessary interference with freedom of commercial expression protected by the First Amendment has not emerged. Britannica submits that the First Amendment requires at a minimum that the government demonstrate that the remedial order is necessary to prevent deception and

(Footnote continued from preceding page.)
and to state that Bufferin and Excedrin are no faster, gentler or stronger than aspirin); *In re Travel King, Inc.*, 86 F. T. C. 715 (1975) (promoters of "psychic surgery" tours to the Philippines required to state in response to all inquiries, "Psychic surgery has been shown to be fraud and fakery . . ."); *In re Arthur Murray Studio, Inc.*, 78 F. T. C. 401 (1971), *aff'd*, 458 F. 2d 622 (5th Cir. 1972) (dance studio required to reveal sales purpose behind contests—consent order); *In re Simeon Mgt. Corp.*, 87 F. T. C. 1184 (1976), *aff'd*, 579 F. 2d 1137 (9th Cir. 1978) (weight reduction clinic required to disclose that its program included injections of a drug not approved by the FDA for treatment of obesity); *In re Kroger Co.*, No. 9102 (F. T. C., filed June 11, 1979) (Initial Decision) (grocery retailer required to state in comparative pricing advertisements, "Whether you will save or how much you will save will depend on how much you buy"); *In re Household Finance Corp.*, No. 9111 (F. T. C., filed Mar. 16, 1979) (Initial Decision) (lender required to send specified "NOTICE OF RIGHT TO CANCELLATION" to customers who reaffirm a previously discharged debt which is not disclosed as a finance charge); *In re Great Atlantic & Pacific Tea Co.*, No. 8916 (F. T. C., filed Mar. 25, 1975) (grocery retailer required to include in each advertisement containing prices of identified items the following statement, "Each of these advertised items is required to be readily available for sale at or below the advertised price in each A&P store, except as specifically noted by this ad"); *In re Peacock Buick, Inc.*, 86 F. T. C. 1532 (1975) (used car dealer required to disclose the exact amount of any handling or service charge, that credit insurance is optional, and the words, "FOR EXACT MILEAGE, SEE ODOMETER"); *In re State Credit Control Bd.*, 70 F. T. C. 1318 (1966) (collection agency required to disclose the extent and nature of its authority to act in connection with each debt); *In re Taylor-Friedsam Co.*, 69 F. T. C. 483 (1966) (seller of imported ribbon required, whenever making representations about fiber content, to affix a tag with fiber content information to the ribbon); *In re USLife Credit Corp.*, 91 F. T. C. 984 (1978), *vacated*, ... F. 2d ..... (5th Cir. 1979) (lender required to state on forms, "You are *not* required to purchase" credit insurance in connection with a loan).

Other cases involving affirmative disclosure requirements include: *In re Firestone Tire & Rubber Co.*, 81 F. T. C. 398 (1972), *aff'd*,

(Footnote continued on next page.)

that proffered alternatives are false or misleading before it can thrust its phraseology upon an unwilling speaker.

If there is constitutional doubt about the FTC's continuing program of prior restraints in the form of overbroad affirmative disclosure orders under its "fencing-in" doctrine, as there must be, the Court should grant the writ to state the appropriate rule.

II. This Court Should Grant the Writ to Resolve the Serious Conflict Between the Circuits on the Scope of Review of FTC Orders Prescribing the Content of Commercial Communication.

In *Beneficial Corp.* v. *FTC*, 542 F. 2d 611 (3d Cir. 1976), *cert. denied* 430 U. S. 983 (1977), the Third Circuit adopted a new and more exacting standard of judicial review of remedies ordered by adminstrative agencies in First Amendment commercial-speech cases and rejected for such cases the old standard of review formulated in *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608

(Footnote continued from preceding page.)
481 F. 2d 246 (6th Cir. 1973), *cert. denied*, 414 U. S. 1112 (1973); *In re Thermochemical Products, Inc.*, 76 F. T. C. 107 (1969); *In re S. S. S. Co.*, 73 F. T. C. 1058 (1968), *enforced*, 416 F. 2d 226 (6th Cir. 1969); *In re General Transmissions Corp.*, 73 F. T. C. 399 (1968); *In re Western Radio Corp.*, 63 F. T. C. 882 (1963), *modified on other grounds*, 339 F. 2d 937 (7th Cir.), *cert. denied*, 381 U. S. 938 (1965); *In re Tashof*, 74 F. T. C. 1361 (1968), *aff'd*, 437 F. 2d 707 (D. C. Cir. 1970); *In re Universal Credit Acceptance Corp.*, 82 F. T. C. 570 (1973), *rev'd in part on other grounds, Heater* v. *FTC*, 503 F. 2d 321 (9th Cir. 1974); *In re Hollywood Carpets, Inc.*, 86 F. T. C. 784, 822 (1975); *In re Crown Central Petroleum Corp.*, 84 F. T. C. 1493 (1974), *modified*, 88 F. T. C. 210, 211 (1976); *In re Baldwin Bracelet Corp.*, 61 F. T. C. 1345, 1377 (1962), *aff'd*, 325 F. 2d 1012 (D. C. Cir. 1963), *cert. denied*, 377 U. S. 923 (1964); *In re Manco Watch Strap Co.*, 60 F. T. C. 495, *modified*, 61 F. T. C. 298 (1962); *In re ITT Continental Baking Co.*, 83 F. T. C. 1105, 1108 (1973), *rev'd in part*, 532 F. 2d 207, 220-21 (2d Cir. 1976); *In re Marketing Dev. Corp.*, No. 9067 (F. T. C., filed June 7, 1979).

(1946).* Recognizing that the *Beneficial* standard would significantly curb its broad exercise of remedial discretion, the FTC filed a certiorari petition asking this Court to reject the *Beneficial* formulation and re-instate the *Siegel* formulation even for First Amendment cases. This Court denied certiorari leaving the Third Circuit's decision standing. In the court below, the FTC asked the court to adopt the *Siegel* standard of review in this case. The Seventh Circuit did so, affirmed the overbroad FTC order as a result, and its decision is consequently in direct conflict with that of the Third Circuit.

In *Beneficial,* the Third Circuit reversed an FTC order prohibiting the use of the phrase "Instant Tax Refund" on the basis of appellant's First Amendment claim that the phrase could have been rendered non-deceptive by the alternate means of adding certain explanatory words. The Third Circuit stated that the FTC's "broad construction of its § 5 remedial authority cannot survive the demise of the commercial speech exception to the First Amendment." 542 F. 2d at 620. In addressing the standard of review to be applied to the FTC order, the Third Circuit held:

> "[W]e are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders that bear some rational relationship to the . . . violation . . . . But we are dealing in this case with the Government regulation of a form of speech. *The first*

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* In the most frequently cited formulation, this Court stated in *Siegel* (327 U. S. at 611-13):

> "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices in this area of trade and commerce. . . . Judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. . . . The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."

> *amendment requires, we believe, an examination of the Commission's action that is more searching than in other contexts.*" (Emphasis added.) 542 F. 2d at 618-19.

In addressing the substantive First Amendment standard to be applied by the FTC, the Third Circuit stated:

> "The Commission, like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising can go no further than is necessary for the elimination of the deception." 542 F. 2d at 620.

Applying the strict standard of review formulated above, the Third Circuit analyzed whether the total ban on the use of the offending phrase was permissible and concluded that the advertising might be rewritten in various ways to eliminate deception while still utilizing the specified phrase. The Third Circuit held that the First Amendment required the FTC to permit use of such alternative forms of disclosure, and the court consequently remanded the case to the FTC.

The FTC filed a petition for a writ of certiorari in *Beneficial* asking this Court in its "Question Presented" to decide whether the Third Circuit "applied an erroneous standard of judicial review of remedies of administrative agencies." The FTC quoted the standard formulated in *Siegel* and argued that even in First Amendment cases courts should apply the *Siegel* "wide latitude" "reasonable relation" "abuse of discretion" standard of review. The FTC stated:

> "The restrictions that the court of appeals decision [in *Beneficial*] imposes upon the Commission's ability to frame effective remedies in such cases and the expanding role of the courts in reviewing its orders which that decision presages would seriously handicap the agency's ability properly to perform its duties in this important

aspect of its work."* FTC Petition for Certiorari at p. 17.

This Court denied the FTC's petition.

Although the FTC failed in its efforts to have *Beneficial* reversed, the FTC in this case asked the Seventh Circuit to apply the *Siegel* standard of review** and the Seventh Circuit did so. The Seventh Circuit stated the standard of judicial review of the Order as follows (p. A9):

> "Once a violation of the Act has been found our role in reviewing the remedy is a narrow one. . . .
>
> > 'The Commission . . . has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' *Jacob Siegel Co. v. FTC.* . . ."

The Seventh Circuit upheld the disclosure requirements of the Order because they "were reasonably related to the deceptive practices found" and were not "an abuse of discretion." (pp. A10-A11) The Seventh Circuit engaged in no independent judicial analysis, as required by *Beneficial,* into whether the alternatives suggested by Britannica were adequate to achieve the objective of truthful communications. Further, it conceded that the ALJ and the FTC made "no express comparison"

* The FTC in its certiorari petition in *Beneficial* did not dispute the general First Amendment proposition, also quoted by the Seventh Circuit in its opinion in this case, that a remedy should "go no further than is necessary to prevent deception." Instead, it quoted and directly attacked the Third Circuit's refusal in a First Amendment case to "defer broadly to the Commission's exercise of informed discretion," arguing that this Court's First Amendment commercial speech decisions did not "change the scope of judicial review of Commission orders." FTC Petition for Certiorari at pp. 14-15.

** The FTC contended in the Seventh Circuit:

> "It is well settled that the Commission has wide latitude in fashioning remedies to stop the unlawful practices found to exist, and 'courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist' [citing *Siegel*]." Brief of FTC in Seventh Circuit at p. 13.

involving the alternative remedies (p. A11) and justified the FTC's failure on the ground that the issue was "only the form of disclosure to be required." (p. A12)* Through application of the *Siegel* standard of review, and rejection of the *Beneficial* standard, the Seventh Circuit let stand an order which is simply inconsistent with the First Amendment.**

The Seventh Circuit, at the express urging of the FTC, thus placed itself in square conflict with the Third Circuit's decision in *Beneficial.*

Britannica agrees with the FTC as to the importance of the standard of judicial review of FTC orders in First Amendment cases. In its petition to this Court in *Beneficial* the FTC stated:

> "The issue is important in the Commission's administration of the Federal Trade Commission Act. A major portion of the Commission's work under the Act involves the elimination and prevention of false and misleading advertising." FTC Petition for Certiorari at p. 16.

The conflict between the Third and Seventh Circuits now makes resolution of the issue by this Court critical. As discussed in Point I, *supra,* the FTC regularly elects to "remedy" deceptive practices by overly broad orders dictating the form and content of communications. Unless the conflict is resolved, those orders reviewed under the standard applied in this case by the Seventh Circuit will stand while similar orders reviewed in the Third Circuit will not.

The writ should be granted to resolve the conflict.

* It was this precise issue—the extent to which the government could constitutionally impose a certain *form* of expression upon a commercial speaker—which this court expressly left open in *Virginia State Board of Pharmacy* and which makes the *Beneficial* standard of review appropriate.

** The effect of the Seventh Circuit's decision under the *Siegel* standard is to defer to the FTC as an "expert body" the resolution of the serious First Amendment issues presented by the Order. But the FTC has no "expertise" in evaluating First Amendment claims, any more than a movie censorship board has "expertise" to evaluate the First Amendment claims of movie patrons.

III. The Writ Should Be Granted Because the Judgment Below Conflicts with the First Amendment Principles Enunciated by This Court Which Are Applicable to a Prior Restraint on the Communications of a Publisher Engaged in the Distribution of Its Publications.

The judgment below affirms a government-imposed prior restraint which—even if it were constitutional as applied to a seller of toothpaste, mouthwash, or other such products—is in direct conflict with the decisions of this Court according full First Amendment protection to a publisher engaged in the distribution of its publications.

It is axiomatic that the right to distribute is part of the First Amendment freedom of speech and of the press. See *Smith* v. *California,* 361 U. S. 147 (1959) (subjecting government regulation of booksellers to First Amendment scrutiny).* In *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965), this Court stated:

> "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute. . . ."

Britannica does not contend that the FTC lacks the power to enjoin speech relating to the distribution of books that is actually

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* In *Smith* v. *California, supra,* the Court said (361 U. S. at 150):

> "[T]he free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices."

See also, Emerson, *The System of Freedom of Expression* at pp. 416-17 (1970); Note, 44 *Univ. Chi. L. Rev.* 205, 235-36 (1976): "Advertisements for . . . protected written works should be fully protected as an incident to the first amendment value of the underlying speech or activity. . . . To treat such activity as commercial speech would inhibit the rights of publishers and authors to distribute their works. . . ."

false or deceptive. But in this case the FTC and the Seventh Circuit have gone far beyond a prohibition on fraud and have established an unprecedented requirement that a publisher undertake to utter specified words put in its mouth by a government agency—a requirement of a type never sustained by this Court.* It is as if the FTC, having determined that the slogan contained in the upper left-hand corner of the first page of every *New York Times,* "All the News That's Fit to Print," is false and misleading, then ordered not only the deletion of this misrepresentation but that the paper carry in its stead in inordinately bold type:

> "WARNING: Some of the news contained herein is not fit to print and some of the news that is fit to print is omitted herefrom."

Further, the Order not only imposes a requirement that Britannica make statements affirmatively prescribed in rigid detail by a government agency, but it constitutes a prior restraint on *all* communication, including entirely truthful communications, not complying with such specifications.

This Court has repeatedly stated that any prior restraint of expression comes to the Court bearing "a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963). See also, *e.g., Near* v. *Minnesota,* 283 U. S. 697 (1931); *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971) (the government "carries a heavy burden of showing justification for the imposition of a such a restraint"). And this Court has repeatedly made clear that any restriction on First Amendment freedoms "must be no greater than is necessary or essential to the pro-

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* The decisions of this Court have stood four-square for the proposition that government has no authority to compel a speaker to utter words formulated by it for pronouncement by the speaker. See, *e.g., Wooley* v. *Maynard,* 430 U. S. 705 (1977); *Miami Herald Pub. Co.* v. *Tornillo,* 418 U. S. 241 (1974); *Engel* v. *Vitale,* 370 U. S. 421 (1962); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943).

tection of the particular governmental interest involved." *Procunier* v. *Martinez,* 416 U. S. 396, 413 (1974). See also, *e.g., Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960); *Gooding* v. *Wilson,* 405 U. S. 518, 521-22 (1972). Here the ALJ, in direct contradiction of these established constitutional principles, stated in sustaining the severe restraints contained in the Order: "All doubts as to remedy are to be resolved in [the government's] favor." (p. A158) The Seventh Circuit majority upheld the specifications because it "was not persuaded that a [sic] remedy ordered by the Commission is not the least restrictive alternative." (p. A15) The court thus reversed the applicable presumption, placing the burden on Britannica to demonstrate that the Order was *not* the least restrictive alternative rather than requiring the government to meet the "heavy burden" placed upon it by this Court's decisions. The Seventh Circuit upheld the Order without explaining, or requiring the FTC to explain, why the less restrictive forms of remedy suggested by Britannica were in any way inadequate to achieve the objective of completely truthful communication.

The Seventh Circuit simply misconstrued in a fundamental way the constitutional principles applicable to this case, ignoring altogether the fact that the Order is a direct restraint on the communications of a publisher engaged in the distribution of its publications and, therefore, entitled to the fullest degree of First Amendment protection.* This Court should grant certiorari to prevent the clear violation of Britannica's First Amendment rights represented by the judgment below.

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* As Britannica argued in the court below, if the sellers of erotic literature are entitled to constitutional protection against over-broad restraints, then surely Britannica, the publisher of the nation's finest reference work (esteemed by educators and employed by Americans in all walks of life to enhance their education) is entitled to the same protection. Brief for Britannica in the Seventh Circuit at p. 45. Despite Britannica's strenuous urging, however, there is not one word in the Seventh Circuit opinion to indicate a recognition that this case involves a direct restraint on the dissemination of publications fully protected by the First Amendment.

IV. The Writ Should Be Granted to Decide the Important Issue of the FTC's Statutory Authority to Prescribe Conduct Which Unnecessarily Threatens the Continued Viability of an Established Method of Doing Business.

The FTC has overstepped the bounds of its statutory authority in imposing its affirmative disclosure requirements upon Britannica. By specifying what Britannica must say and minutely defining how and when Britannica must say it, the Order renders almost unusable Britannica's principal method of conducting its business. As the ALJ, the FTC, and the reviewing court expressly recognized, Britannica relies upon in-home presentations as its principal method of marketing its encyclopedia and other publications. (pp. A2, A26, A61) Consequently, the Order, which dictates the content and format of Britannica's initial contacts with prospective customers, strikes at the very heart of Britannica's sales efforts.

In reviewing FTC orders prohibiting the use of trade names, this Court has held that the FTC's remedial power is limited when it issues orders which would destroy valuable business assets. In *FTC* v. *Royal Milling Co.,* 288 U. S. 212 (1933), this Court reversed an FTC order barring the use of certain trade names. This Court said that the trade names "constitute valuable business assets . . . the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result." 288 U. S. at 217. Similarly, in *Jacob Siegel Co.* v. *FTC,* 327 U. S. 608, 611 (1946), the Court, while acknowledging that the FTC generally "has wide discretion in its choice of a remedy," reversed an order barring the use of a trade name on the ground that the FTC had failed to consider whether qualifying language, as opposed to a complete bar, would be sufficient to eliminate the deception.

The *Royal Milling* and *Siegel* decisions, requiring a clear demonstration by the FTC that less drastic alternatives are

unavailable, apply by direct analogy to the present case in which the FTC's order threatens to deprive Britannica of its ability to pursue its principal method of distributing its products. This established and well-developed marketing technique is a business asset at least as important and valuable to Britannica as the trade names at issue in *Royal Milling* and *Siegel*. At a minimum, Britannica submits that the purely remedial power vested in the FTC under the Act* does not justify the destruction of a long-established mode of doing business without an explicit consideration by the FTC of alternative remedies and a demonstration of why such alternatives are inadequate to accomplish the objective.

Nothing in the language or legislative history of the Federal Trade Commission Act indicates any Congressional intent to vest in the FTC authority to go beyond the prohibition of deceptive practices and impose its own views of "desirable" business conduct. When the Federal Trade Commission Act was amended to include "deceptive acts or practices," a Federal Trade Commissioner stated in the course of the hearings:

> "Now another thing I wish you to remember is this: The Federal Trade Commission cannot impose any penalties whatever. The authority of the Federal Trade Commission is wholly preventive or injunctive. All that the Federal Trade Commission can do or undertake to do, if it finds that someone is violating the law over which it has jurisdiction, is to say, 'Stop.' 'Stop that practice.' 'Cease and desist from that practice.' That is all it can do." Comments of FTC Commissioner Edwin L. Davis, Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on Senate Bill 3744 in the 74th Congress (1937).

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* In *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619, 623 (1927), this Court stated:

> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. . . . It has not been delegated the authority of a court of equity."

Members of Congress have continued to insist that the Act is not intended to vest in the FTC broad authority to prescribe the manner of conduct for business enterprises. On October 5, 1979, two members of the FTC appearing at oversight hearings before the Consumer Subcommittee of the U. S. Senate Committee on Commerce, Science and Transportation, were questioned by the Chairman of the Committee with specific reference to the 3-by-5 warning card and the other affirmative requirements of the Order in this case:

> Chairman: Well, I completely understand your cease and desist type of things, but where you require a company to affirmatively do a precise and specific thing that you do not require a competitor to do affirmatively, then it seems to me if you are taking that position you are wrong. *That is not my intent as a member of Congress. And if the courts say that in interpreting the law that you have properly applied your authority, then we need to take some of the authority away.* (Emphasis added.)

The statutory principles dictate that a remedy must be, in fact, a remedy and not a gratuitous or punitive destruction of established property interests. In failing to limit the FTC's action to what is necessary to achieve the remedial objective of avoiding deception, the judgment below raises a serious issue as to the limits of the FTC's statutory authority which requires review by this Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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